(3)

No. 04-464

In the Supreme Court of the United States

CITY OF NEW YORK, NEW YORK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether welfare recipients required to participate in New York City's Work Experience Program (WEP) are employees within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

2. Whether a provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 42 U.S.C. 608(d), that specifies that four statutes other than Title VII apply to a program that receives assistance under PRWORA precludes the application of Title VII to WEP participants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A52) is reported at 359 F.3d 83. The opinion of the district court (Pet. App. A55-A74) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2004. A petition for rehearing was denied on May 27, 2004 (Pet. App. A53-A54). The petition for a writ of certiorari was filed on August 10, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) established

a new program for providing assistance to needy families—Temporary Assistance for Needy Families (TANF). That program is designed to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage." 42 U.S.C. 601(a). Under TANF, States that receive federal funds may provide needy parents and caretakers with cash assistance, but that assistance must be conditioned upon the recipient's participation in "work activities." 42 U.S.C. 607(d) and (e)(1).[1] If an eligible parent or caretaker refuses without good cause to satisfy that work requirement, the State must reduce or terminate assistance. 42 U.S.C. 607(e)(1).

New York State administers TANF through local districts, such as the City of New York. Pet. App. A6. In New York City, one of the work activities in which TANF recipients may participate is the Work Experience Program (WEP). *Id.* at A57-A58 Under WEP, the New York City Human Resources Administration

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[1] PRWORA defines "work activities" to include "(1) unsubsidized employment; (2) subsidized private sector employment; (3) subsidized public sector employment; (4) work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available; (5) on-the-job training; (6) job search and job readiness assistance; (7) community service programs; (8) vocational educational training (not to exceed 12 months with respect to any individual); (9) job skills training directly related to employment; (10) education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency; (11) satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and (12) the provision of child care services to an individual who is participating in a community service program." 42 U.S.C. 607(d); see also N.Y. Soc. Serv. Law § 336(1) (McKinney Supp. 2005).

(HRA) assigns TANF recipients to work for public and nonprofit agencies. *Id.* at A58. Adults without dependent children who receive state-funded public assistance also participate in that program. *Id.* at A6. The number of hours each WEP worker is required to work is determined by dividing the monetary amount of that individual's TANF or state benefit by the minimum wage. *Id.* at A58. The agencies to which WEP workers are assigned establish work schedules, assign tasks, train workers, and supervise their work. *Ibid.*

As required by PRWORA and New York law, each WEP worker's cash assistance is contingent upon compliance with the terms of that person's work assignment. Pet. App. A6-A7. A WEP worker who satisfactorily performs the required job duties receives cash assistance. *Ibid.* Conversely, if a WEP worker fails or refuses to work without good cause, that individual receives either less or no cash assistance. *Ibid.* WEP workers also receive reimbursement for transportation costs to and from their WEP assignments, payment of authorized child care expenses, and workers' compensation coverage. *Id.* at A58.

2. The United States filed a complaint against the City of New York and the New York City Housing Authority, alleging that Maria Gonzalez, Tammy Auer, Theresa Caldwell-Benjamin, and Tonja McGhee were subjected to sexual or racial harassment while working at their WEP job assignments, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. A58. All four women intervened.[2] Norma Colon filed a similar Title VII suit against the City of

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[2] McGhee settled her claims with petitioners and is no longer a party to this case.

New York. *Id.* at A11-A12. The district court granted the City's motion to dismiss. *Id.* at A55-A74. The court held that in order to qualify as an "employee" protected by Title VII, a worker must receive remuneration. *Id.* at A71. The court further held that the individual plaintiffs did not receive remuneration. *Id.* at A71-A72.

3. The court of appeals reversed. Pet. App. A1-A52. The court noted that the Second Circuit applies a two-part test to determine whether a worker qualifies as an employee for purposes of Title VII. First, to qualify as an employee, a worker must receive remuneration. *Id.* at A15. Once that threshold requirement is satisfied, the court considers 13 factors derived from the common law of agency to determine if an employment relationship exists. The most important of those 13 factors is the extent to which the hiring party controls the manner and means by which the worker completes assigned tasks. *Id.* at A15-A16.

Applying its two-part test, the court of appeals found that the individual plaintiffs' work was completely controlled by the agencies for which they worked, satisfying the common law agency standard. Pet. App. A16. The court of appeals further held that the individual plaintiffs' receipt of cash payments and food stamps constituted remuneration. *Id.* at A16-A17. The court explained that the individual plaintiffs received the cash payments and food stamps in return for their work, that those payments equaled the minimum wage times the number of hours worked, and that a plaintiff who unjustifiably refused to work would lose the portion of the grant attributable to her. *Id.* at A16. The court of appeals also concluded that the individual plaintiffs' receipt of transportation expenses, child care expenses, and eligibility for workers' compensation constituted

remuneration. *Id.* at A16-A17. The court of appeals rejected petitioner's reliance on *Johns* v. *Stewart*, 57 F.3d 1544 (10th Cir. 1995), and *Brukhman* v. *Giuliani*, 727 N.E. 2d 116 (N.Y. 2000), on the ground that those cases did not involve either Title VII or the PRWORA. Pet. App. A19-A22.

The court of appeals also rejected the City's contention that, under the principle of *expressio unius*, PRWORA's specification that four statutes other than Title VII apply to programs that receive assistance under PRWORA precludes the application of Title VII to WEP workers. Pet. App. A27. The court reasoned that because Title VII does not go "hand in hand" with the listed statutes, the *expressio unius* principle does not apply. *Ibid.* The court further reasoned that the City's argument amounted to a claim of implied preemption and that the specification of the four statutes did not show that Congress clearly intended to exclude WEP workers from the protection of Title VII. *Id.* at A26-A27.

Judge Jacobs dissented. Pet. App. A36-A52. He concluded that the benefits received by WEP participants do not amount to a form of compensation. *Id.* at A39-A48.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The interlocutory posture of the case and the absence of a permanent reauthorization to the underlying funding program also counsel against review. The petition for a writ of certiorari should therefore be denied.

1. Petitioners contend (Pet. 20-28) that the individual plaintiffs are not employees within the meaning of Title VII. That contention is without merit. As the court of appeals held (Pet. App. A16), because the individual plaintiffs' work was controlled by the various agencies for which they worked, and they received substantial remuneration for their work, they were employees within the meaning of Title VII.

Petitioners do not take issue with the court of appeals' holding that individuals who are subject to the control of an employer and who receive remuneration for their work are employees within the meaning of Title VII. Nor do they challenge the court of appeals' conclusion that the individual plaintiffs were subject to the control of the agencies for which they worked. Instead, they argue that the individual plaintiffs were not employees because they did not receive remuneration. As the court of appeals concluded, however, the individual plaintiffs received remuneration in two forms.

First, they received cash assistance that was conditioned upon the performance of their WEP work assignments. Specifically, if the individual plaintiffs complied with the terms of their WEP work assignments, they received cash assistance; if they failed without good cause to show up for or carry out their WEP duties, they received less or no cash assistance. See Pet. App. A16; 42 U.S.C. 607(e)(1) ("[I]f an individual in a family receiving assistance under the State program funded under this part refuses to engage in work required in accordance with this section, the State shall—(A) reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the State) with respect to any period during a month in which the individual so refuses; or (B) terminate such assistance,

subject to such good cause and other exceptions as the State may establish."); N.Y. Soc. Serv. Law § 342(1) (McKinney Supp. 2005) ("[A]n individual who is required to participate in work activities shall be ineligible to receive public assistance if he or she fails to comply, without good cause, with the requirements of this title."). Second, the individual plaintiffs received significant indirect remuneration in exchange for their work. In particular, they received reimbursement for transportation costs to and from their WEP assignments, payment of certain child care expenses, and workers' compensation coverage. Pet. App. A16.

Petitioners challenge the court's conclusion that the individual plaintiffs received remuneration on three grounds. None is persuasive. First, petitioners contend (Pet. 22) that the cash assistance cannot be regarded as remuneration because a WEP worker's family continues to receive assistance even when the WEP worker fails to work as required. But as the court of appeals explained, "a plaintiff who unjustifiably refused to work would lose the portion of the family's grant attributable to her," so that "each plaintiff had to work in order to receive her share of the family grant." Pet. App. A16. Accordingly, under a "functional commonsense assessment," the cash assistance constitutes remuneration to the WEP worker. *Ibid.*

Second, petitioners mistakenly argue (Pet. 22) that 42 U.S.C. 608(c) shows that the cash assistance that WEP workers receive cannot be regarded as wages. Section 608(c) provides that "[a] penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under the State program funded under this part shall not be construed to be a reduction in any wage paid to

the individual." 42 U.S.C. 608(c). As the court of appeals explained, Section 608(c) does not state that benefits are not wages, but only that a reduction in benefits should not be regarded as a reduction in wages. As such, it harmonizes the provision that allows an employer to sanction a recalcitrant worker with a loss of pay with the requirement that workers not be paid below the minimum wage. Pet. App. A24. Just as an ordinary worker does not suffer a wage reduction for minimum wage purposes simply because that individual's pay is docked, a WEP worker does not suffer a wage reduction when that individual is sanctioned with a loss of pay for failing to work as required. The cash payments received by both kinds of workers, however, are still wages. In any event, in order to qualify as an employee, it is not necessary that a worker receive wages; it is sufficient that the worker receive substantial job-related benefits. *Pietras* v. *Board of Fire Comm'rs*, 180 F.3d 468, 473 (2d Cir. 1999). The individual plaintiffs received substantial work-related benefits here.

Third, petitioners contend (Pet. 26) that the benefits at issue in this case cannot be regarded as remuneration because those benefits are "need-related," rather than "job-related." Those two categories, however, are not mutually exclusive. While the individual plaintiffs would not have been working in the WEP if they did not meet the applicable need standards, they were nonetheless working in the WEP in order to obtain cash assistance. The benefits were therefore "job-related" as well as "need-related."

Finally, all of petitioners' contentions fail to take into account that the principal purpose of considering whether a worker receives remuneration is to distinguish "employees" from "volunteers." *York* v. *Associa-*

tion of the Bar, 286 F.3d 122, 126 (2d Cir. 2002) (incidental benefits insufficient to show that worker received remuneration test because that would render all volunteer activity employment under Title VII). WEP workers are not volunteers. They are not cleaning city parks, maintaining public buildings, or doing office work as volunteers; they are receiving remuneration in exchange for their work. While the remuneration takes the form of welfare benefits, as opposed to a more conventional salary, WEP workers are still receiving money and benefits because they perform work. They are therefore employees within the meaning of Title VII.

2. Petitioners alternatively contend (Pet. 26-28) that 42 U.S.C. 608(d) makes Title VII inapplicable to WEP participants. In particular, they argue that because Section 608(d) identifies four federal nondiscrimination statutes that are applicable to work programs and activities receiving federal funds under TANF, and does not include Title VII in that list, Title VII does not apply to WEP participants. For the reasons discussed above, however, Title VII applies to WEP participants because WEP participants are employees as that term is used in Title VII. Because Title VII applies to WEP participants by its own terms, there was no need for Congress to specify in PRWORA that Title VII applies to WEP workers.

To the extent that petitioners are arguing that Section 608(d) preempts the application of Title VII to WEP workers, that argument is incorrect. A statute does not preempt a prior statute absent an express manifestation of a preemptive intent. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). And Section 608(d)

does not express Congress's manifest intent to preempt Title VII.

Nothing in Section 608(d) states that Title VII shall not apply to WEP workers. Nor is there any language stating that the statutes identified in Section 608(d) are the only nondiscrimination protections afforded to participants in workfare programs. Significantly, when Congress wishes to preempt the application of Title VII, it does so explicitly. See, *e.g.*, 42 U.S.C. 5055(a) (providing that VISTA volunteers "shall not be deemed Federal employees and shall not be subject to the provisions of laws relating to Federal officers and employees and Federal employment"). Title VII expresses this country's commitment to the principle that individual workers should not be subjected to discrimination on the basis of race and sex. Petitioners have not identified any reason that Congress would not have wanted WEP workers to receive that fundamental protection. The court of appeals therefore correctly held that Title VII applies to WEP workers.

3. Petitioners contend (Pet. 20) that the decision below conflicts with the Tenth Circuit's decision in *Johns* v. *Stewart*, 57 F.3d 1544 (1995). For several reasons, however, there is no conflict. First, that case did not raise the question whether a PRWORA worker is an employee within the meaning of Title VII. Instead, the question in *Johns* was whether plaintiffs who received public assistance by participating in state-run work programs were "employees" within the meaning of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et. seq.* 57 F.3d at 1559. Second, the Tenth Circuit did not establish a categorical rule that persons who receive public assistance by participating in a work program can never be employees within the meaning of the FLSA.

Instead, that court examined all the facts and circumstances to determine whether the workers at issue were employees, an approach that is consistent with the approach adopted by the court below. Third, some of the factors relied on by the Tenth Circuit in *Johns* are not present in this case. For example, the named plaintiffs in *Johns* did not receive any benefits from their alleged employer, while the individual plaintiffs here received benefits directly from the City. In addition, the program at issue in *Johns* was not a work program like the WEP, but rather a program involving participation in a broad range of adult education, short-term skills training, community work, and job search activities. 57 F.3d at 1558. There is therefore no square conflict between *Johns* and the decision below.

Petitioners also err in contending (Pet. 23) that the decision below conflicts with the New York Court of Appeals' decision in *Brukhman* v. *Giuliani*, 727 N.E.2d 116 (2000). That case did not involve the definition of employee under Title VII. Rather, based on the terms and legislative history of a state constitutional provision concerning prevailing wages, the New York Court of Appeals held that WEP participants are not employees under that state constitutional provision. *Id.* at 119-122. That state law determination has no bearing on the question presented here.

4. Certiorari is also unwarranted because this case is in an interlocutory posture. The court of appeals held that the district court had erred in granting a motion to dismiss the complaint and remanded the case for trial on the merits. Should petitioners prevail on the merits, the questions they now seek to present will become academic. Should respondents prevail on the merits, petitioners will be able to present those issues to this

Court following entry of a final judgment. This Court ordinarily awaits the entry of final judgment before granting review, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967), and there is no reason to depart from that practice here.

Finally, Congress authorized the TANF program to operate only until fiscal year 2002. 42 U.S.C. 603. While Congress has enacted multiple short-term extensions of the TANF program, it has not reauthorized the program. See Welfare Reform Extension Act, Pt. VIII, Pub. L. No. 108-308, 118 Stat. 1135-1136 (extending TANF until March 2005). The uncertainty concerning the reauthorization of the TANF program is yet another reason that certiorari is unwarranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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